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Denise Robinson 381D Park Ridge Lane Aurora IL 60504 COPY MAILED

SEP 1 7 2007

In re Application of

OFFICE OF PETITIONS

Robinson

: DECISION ON PETITION

Application No. 10/619,024 Filed: July 14, 2003

:

Atty. Dkt. No.: 23-0267

:

This is a decision on the petition under 37 CFP 1

This is a decision on the petition under 37 CFR 1.137(a), filed July 13, 2007, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is not a final agency decision.

This application became abandoned July 13, 2006 for failure to timely reply to the Notice mailed April 12, 2006. The Notice set a three month statutory period of time for reply. Notice of Abandonment was mailed September 13, 2006.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The present petition lacks requirement (3) above. Petitioner has failed to present a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable.

The Office may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is

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shown to the satisfaction of the Director to have been "unavoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPO 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

Petitioner would seem to attribute the failure to timely reply to the Notice to miscommunication between applicant and applicant's prior attorney, prior counsel alleged to have never informed applicant of the outstanding Notice.

The Patent and Trademark Office must rely on the actions or inactions of duly authorized and voluntarily chosen representatives of the applicant, and applicant is bound by the consequences of those actions or inactions. Link v. Wabash, 370 U.S. 626, 633-34 (1962). Specifically, applicant's delay caused by mistakes or negligence of a voluntarily chosen representative does not constitute unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987); Potter v. Dann, 201 USPQ 574 (D.D.C. 1978); Douglas v. Manbeck, 21 USPQ2d (BNA) (1697) (E.D. PA Nov. 7, 1991).

Any renewed petition must be supported by evidence that sufficiently establishes that the entire period of delay in timely responding to the Notice was unavoidable within the meaning of 37 CFR 1.137(a).

## ALTERNATE VENUE

Petitioner may wish to consider filing a petition stating that the delay was unintentional. Petitioner's attention is directed

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to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable." An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee and reply.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail:

Mail Stop Petition

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

By facsimile:

(571) 273-3205

By hand:

U.S. Patent and Trademark Office

Customer Service Window

Mail Stop Petition Randolph Building 401 Dulany Street Alexandria, VA 22314

Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3205.

Alesia M. Brown Petitions Attorney Office of Petitions

Enclosure

PTO/SB/64 (04-07)
Approved for use through 09/30/2007. OMB 0551-0031
U.S. Patent and Trademark Office, U.S. DEPARTMENT OF COMMERCE
Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

NOTE: If information or assistance is needed in completing this form, please contact Petitions Information at (571) 272-3282.				
The above-identified application became abandoned for failure to file a timely and proper reply to a notice or action by the United States Patent and Trademark Office. The date of abandonment is the day after the expiration date of the period set for reply in the office notice or action plus an extensions of time actually obtained.				
APPLICANT HEREBY PETITIONS FOR REVIVAL OF THIS APPLICATION				
Reply and/or fee     A. The reply and/or fee to the above-noted Office action in the form of(identify type of reply):				
etic				

[Page 1 of 2]
This collection of information is required by 37 CFR 1.137(b). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 1.0 hour to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

PTO/SB/64 (04-07)

Approved for use through 09/30/2007. OMB 0651-0031

U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

3. Term	ninal disclaimer with disclaimer fee				
	Since this utility/plant application was filed or	n or after June 8, 1995,	no terminal disclaimer is required.		
4. STA filing Tradaabar	A terminal disclaimer (and disclaimer fee (37 for other than a small entity) disclaiming the PTO/SB/63). TEMENT: The entire delay in filing the require of a grantable petition under 37 CFR 1.137(klemark Office may require additional informating and the delay in filing a petition under sections (III)(C) and (D)).]	required period of time ed reply from the due do b) was unintentional. [N ion if there is a guestion	is enclosed herewith (see  ate for the required reply until the  OTE: The United States Patent and  as to whether either the		
	WARNING:				
numbers the USP USPTO, to the U of the ap of a pat reference	er/applicant is cautioned to avoid submitting persute to identity theft. Personal information such is (other than a check or credit card authorization of PTO to support a petition or an application. If this to petitioners/applicants should consider redacting subsections. Performed that the resultance of the performance of the performa	as social security number form PTO-2038 submitted type of personal information such personal information ecord of a patent application pliance with 37 CFR 1.21 d application may also be (see 37 CFR 1.14). Check form of the control	ers, bank account numbers, or credit card for payment purposes) is never required by on is included in documents submitted to the from the documents before submitting them on is available to the public after publication 13(a) is made in the application) or issuance available to the public if the application is the sand credit card authorization forms PTO-		
_	Signature		Date		
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_	Typed or printed name Registration Number, if applicable				
	Address		Telephone Number		
_	Address				
Enclosures: Fee Payment					
	Reply				
	Terminal Disclaimer Form				
	Additional sheets containing statements establishing unintentional delay				
	Other:				
i he	CERTIFICATE OF MAILIN ereby certify that this correspondence is being Deposited with the United States Post postage as first class mail in an envel Patents, P. O. Box 1450, Alexandria, Transmitted by facsimile on the date s Office at (571) 273-8300.	g: tal Service on the date : ope addressed to: Mail VA 22313-1450.	shown below with sufficient Stop Petition, Commissioner for		
	Date	Signature			
		Typed or printed nam	ne of person signing certificate		

## **Privacy Act Statement**

The **Privacy Act of 1974 (P.L. 93-579)** requires that you be given certain information in connection with your submission of the attached form related to a patent application or patent. Accordingly, pursuant to the requirements of the Act, please be advised that: (1) the general authority for the collection of this information is 35 U.S.C. 2(b)(2); (2) furnishing of the information solicited is voluntary; and (3) the principal purpose for which the information is used by the U.S. Patent and Trademark Office is to process and/or examine your submission related to a patent application or patent. If you do not furnish the requested information, the U.S. Patent and Trademark Office may not be able to process and/or examine your submission, which may result in termination of proceedings or abandonment of the application or expiration of the patent.

The information provided by you in this form will be subject to the following routine uses:

- The information on this form will be treated confidentially to the extent allowed under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C 552a). Records from this system of records may be disclosed to the Department of Justice to determine whether disclosure of these records is required by the Freedom of Information Act.
- 2. A record from this system of records may be disclosed, as a routine use, in the course of presenting evidence to a court, magistrate, or administrative tribunal, including disclosures to opposing counsel in the course of settlement negotiations.
- A record in this system of records may be disclosed, as a routine use, to a Member of Congress submitting a request involving an individual, to whom the record pertains, when the individual has requested assistance from the Member with respect to the subject matter of the record.
- 4. A record in this system of records may be disclosed, as a routine use, to a contractor of the Agency having need for the information in order to perform a contract. Recipients of information shall be required to comply with the requirements of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(m).
- A record related to an International Application filed under the Patent Cooperation Treaty in this system of records may be disclosed, as a routine use, to the International Bureau of the World Intellectual Property Organization, pursuant to the Patent Cooperation Treaty.
- 6. A record in this system of records may be disclosed, as a routine use, to another federal agency for purposes of National Security review (35 U.S.C. 181) and for review pursuant to the Atomic Energy Act (42 U.S.C. 218(c)).
- 7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.
- 8. A record from this system of records may be disclosed, as a routine use, to the public after either publication of the application pursuant to 35 U.S.C. 122(b) or issuance of a patent pursuant to 35 U.S.C. 151. Further, a record may be disclosed, subject to the limitations of 37 CFR 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspection or an issued patent.
- A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.